Supreme Court, U.S.
FILED
07-835 NOV 19 2007
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No.

IN THE

Supreme Court of the United States

COLORADO OFFICE OF CONSUMER COUNSEL,
RHODE ISLAND ATTORNEY GENERAL,
NEW MEXICO ATTORNEY GENERAL,
PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC., AND
NATIONAL CONSUMER LAW CENTER, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 2007

QUESTIONS PRESENTED

Federal Power Act ("FPA") Section 206(a) requires that the Federal Energy Regulatory Commission ("FERC") must modify an initial or existing wholesale electric rate if it finds such rate to be "unjust and unreasonable," and must determine the "just and reasonable" rates "to be thereafter observed and enforced." 16 U.S.C. 824d(a). At the end of the proceeding below, FERC found *all* existing market-rate tariffs to be unlawful unless they included new "behavior conditions." Petitioners sought review, contending that existing market-rate tariffs, even with behavior conditions added, would not constitute lawful filed rates prospectively because they violated the rate filing and review requirements of the FPA. The court held that petitioners' legal challenges were outside the scope of the Section 206(a) proceeding below. However, the court also affirmed FERC's determination that its existing market-rate "tariffs," with the new behavior conditions added, would constitute the "filed rates" to be enforced prospectively. The petition presents the following questions:

1. Whether the D.C. Circuit erred in failing to address, as outside the scope of the proceeding, petitioner's arguments that FERC's existing market-rate "tariffs" are contrary to the FPA, where FERC determined that the lawful "filed rates" to be enforced "thereafter" would be those same existing market-rate tariffs, with certain behavior conditions added?

2. Whether the D.C. Circuit erred in affirming FERC's determination that prospective rates consisting of existing market-rate "tariffs," with new behavior conditions added, constitute the specific and predictable "filed rates" required by FPA Section 206(a) and by this Courts' holdings in *MCI Telecomms. Corp. v. Am. Tel. & Tel. Col,* 512 U.S. 218 (1994) and *Maislin Indus.U.S. v. Primary Steel Inc.,* 497 U.S. 116 (1990).

LIST OF PARTIES

In addition to the parties shown on the cover, the following persons and entities were parties to the proceedings in the court below:

Respondent Federal Energy Regulatory Commission was the respondent below and is the respondent here "by rule." See SUP. CT. RULE 12.6.

Intervenors in the court of appeals' decision were Edison Electric Institute, Avista Energy, Inc., Puget Sound Energy, Inc., Powerex Corp., and Public Service Company of New Mexico.

Initially there were other parties to the consolidated cases before the D. C. Circuit, but they withdrew before the case was argued and submitted and thus were no longer parties by the time of the Court's ruling. Public Citizen, Inc. and the Utah Committee of Consumer Services were petitioners below but have not joined in this Petition.

CORPORATE DISCLOSURE STATEMENT

Public Utility Law Project of New York, Inc., states that it is a non-profit corporation representing the interests of utility consumers on issues affecting affordability of service, consumer protection and universal utility service. Public Utility Law Project of New York, Inc. has no parent company and no subsidiaries or affiliates that have issued shares to the public. No publicly held company has an ownership interest in it.

National Consumer Law Center, Inc. is a non-profit corporation representing the interests of low-income clients on a range of consumer issues including electricity deregulation. The National Consumer law Center, Inc. has no parent company and no subsidiaries or affiliates that have issued shares to the

public. No publicly held company has an ownership interest in it.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the D. C. Circuit is reported at 490 F.3d 954 and is reprinted in the Appendix to the Petition (Pet. App.) at 1a. The Court of Appeals opinion denying rehearing is at Pet. App. 6a. The Court of Appeals opinion denying rehearing en banc is at Pet. App. 7a.

JURISDICTION

The judgment of the United States Court of Appeals for the D. C. Circuit was entered on June 22, 2007. The petitions for rehearing or rehearing en banc were denied on August 20, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, are reproduced in the Appendix to the Petition (Pet. App. 8a-16a).

STATEMENT OF THE CASE

A. Statutory Background

Sections 205 and 206 of the Federal Power Act ("FPA") set forth the standards and procedures by which the Federal Energy Regulatory Commission ("FERC") regulates rates for the sale of electric energy for resale by "public utilities," see Section 201(e). Section 205(a) mandates that all such rates "be just and reasonable," and provides that any rate that is not just and reasonable is unlawful. 16 U.S.C. § 824d(a). Section 205(b) prohibits FPA public utilities from making or granting any undue preference or from subjecting any person to undue prejudice or disadvantage. FERC's review of wholesale rates is made possible by Section 205(c), that requires public utilities to file and keep open to the public schedules showing all rates and contracts, practices, etc. that affect such rates, and Section

205(d), that requires all changes in rates, practices, etc. to be filed sixty days in advance for FERC and public review. 16 U.S.C. § 824d(c) and (d).

Changed or increased rates can be set for hearing under Section 205(e), which allows FERC to suspend the rates for up to five months, and to make their collection subject to refund. 16 U.S.C. § 824d(e). Section 205(e) places the burden of justifying an increased rate on the seller.

Initial rates and changed rates that FERC has allowed to become effective (without refund liability) can be investigated on FERC's motion or on complaint under Section 206(a). 16 U.S.C. §824e(a). In the case of both Sections 205(e) and 206(a), once FERC finds *after hearing* that a rate is unjust and unreasonable, or unduly preferential or discriminatory, FERC must determine the lawful rate to be observed and enforced. Section 206(a) places the burden of proving both the unlawfulness of the rate under review, and of determining the lawful rate to be enforced prospectively, on FERC or on the complainant.

This Court has expressly found that under the FPA, the rate filing requirements of §§ 205(c) and (d) are "no more than are necessary" to implement §§ 205(e) and 206(a):

> The filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of [60]-days' advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under [§ 205(e).]

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), at 342, (applied to FPA in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)) (together "*Mobile/Sierra.*")

B. Background of FERC's MBR Regime

Despite the clear rate filing requirements of the FPA above, and their purpose to allow FERC and public review of rates, as determined by this Court, FERC began, on a case-by-case basis in the late 1980s, to allow individual wholesale sellers to forgo the filing of specific rates, and of FERC rate review, if the agency found that the seller did not have "market power." In such case, the seller was allowed to merely file a "market-rate tariff" that allowed it to charge whatever rate for whatever service the seller could negotiate with a buyer. Because this Court has found that wholesale buyers may pass through the prices they negotiate to retail consumers under the Supremacy Clause of the United States Constitution, courts have found that wholesale buyers may not have incentives to negotiate strongly for lower rates. *Tejas Power Corp. v. FERC,* 908 F.2d 998, 1004 (D.C. Cir. 1990). Nonetheless, FERC continued to allow "market-rate tariffs" solely on its (changing) evaluations of the "market power" of the seller, without regard to whether the buyer had sufficient incentive to negotiate strongly where he could simply pass through his costs.

FERC initially stated in its orders that market-rate tariffs were exceptional rates offered in exceptional circumstances, but before long virtually every wholesale seller in the country, from isolated plants to "power marketers" to huge, registered utility holding companies, enjoyed such exceptional market-rate authorizations. *Southern Co. v. Energy Marketing, L.P.,* 86 FERC ¶ 61,131 (1991). While FERC continued to find that almost no seller for resale in the United States had "market power," it did so on a case-by-case basis, rather than having an area rate or nation-wide ratemaking proceeding. Nonetheless, when complaints were filed under Section 206(a) regarding FERC's failure to follow the FPA rate filing and review prescriptions, such as California's in 2001, FERC rejected them as a "collateral attack" on

its market-based rate regime. *California ex rel. Lockyer,* 383 F.3d 1006, at 1013, n.5 (9th Cir. 2004).

When the state of California had decided to require its utilities to buy from a wholesale spot market, FERC asserted jurisdiction over such sales for resale under the FPA. Sellers in the spot markets for California and the West operated under "market-based tariffs." After a couple of years, when sellers and re-sellers (such as Enron, Reliant, etc.) apparently realized that they could really charge whatever the market would bear, rates in the spot markets skyrocketed. The results have been amply chronicled in a number of decisions of the Ninth Circuit.[1]

C. The FPA Section 206(a) Rate Investigation Below

FERC in 2001 initiated the rate investigation under Section 206(a) below into *all* the "terms and conditions of market-rate authorizations or tariffs" across the country. FERC emphasized that the proceeding below was a rate case by setting a "refund effective date" under section 206(a). *"Order Establishing Refund Effective Date and Proposing to Revise Market-Based Rate Tariffs and Authorizations,"* 97 FERC ¶ 61,220 (Nov. 20, 2001), although subsequently FERC decided to make changes in existing market-rate tariffs only prospectively. The title FERC gave its investigation was: *"Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations." Id.* FERC began its order with this sentence:

> In this order, the Commission institutes a proceeding pursuant to Section 206 of the Federal Power Act (FPA) to investigate the *justness and reasonableness of the terms and conditions of*

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[1] See, e.g., *Lockyer, supra,* at 1008-1010; *PUD #1 v. FERC,* 471 F.3d 1053, *cert. granted.*

> *market-based rate tariffs and authorizations* of public utilities that sell electric energy and ancillary services at wholesale in interstate commerce.

Id., emphasis added. *See, also, id. n. 2* (case includes all tariffs and *rate schedules* under which a public utility is authorized to make sales of electric energy at market-based rates.)

Although FERC focused early on the market manipulation and anticompetitive aspects of seller behavior, petitioners in early January, 2002, urged FERC to reconsider as well other aspects of its market-rate authorizations and tariffs, which they argued did not comply with the FPA itself, as well as being unsound policy. Over the three-year proceedings below, FERC never stated that petitioners' statutory filing and review arguments were outside the scope of the proceeding. Indeed, although noting petitioners' legal arguments from time to time, FERC otherwise ignored them.

D. FERC's Decision

FERC's decision found that existing market-rate authorizations and tariffs were "unjust and unreasonable" without the new "behavior conditions" incorporated as a "voluntary" part of the tariff. 105 FERC ¶ 61,218 at 62,164, P. 162. On rehearing, petitioners' argued, *inter alia*, that FERC was also required, by Section 206(a) itself, to find the just and reasonable rates to be charged prospectively, and that FERC had failed to do so because its existing market-rate tariffs, even with behavior conditions added, did not comply with the FPA. FERC noted this argument, but found only that the "filed rate" going forward would be the existing market-rate tariffs with behavior conditions added. 107 FERC ¶ 61,175 at 61,723, P. 158. FERC's order did not address petitioners' legal arguments, nor did it find

that they were outside the scope of the proceeding below.

FERC did address questions raised by other, industry petitioners regarding whether it had met its burden of proof in finding existing "market-rate tariffs" to be unlawful *without* FERC's "behavior conditions;" however, FERC ignored petitioners' arguments that it had not demonstrated, or even found, that existing market-rate tariffs plus behavior conditions would constitute properly filed and enforceable "just and reasonable" rates prospectively.

E. The D.C. Circuit's Decision

FERC, after unsuccessfully attempting to obtain a voluntary remand of the case from the Court of Appeals, filed a brief that did not argue that petitioners' arguments were outside the scope of the proceeding below, but stated:

> In view of how the issue has been presented, we address it on the merits. See also September 12, 2005 [D. C. Circuit] Order (denying FERC request for voluntary remand).

January 24, 2006 Final FERC Brf. at 60.)

After FERC instituted a new rulemaking in which it proposed to remove or replace the "behavior conditions" herein, it argued that its orders below were moot, and, for the first time, claimed that petitioners' statutory challenges were outside the scope of the proceeding below. The Court of Appeals initiated a new round of briefs and oral argument for petitioners and FERC, the only remaining parties. The court's decision dismissed the petition on the grounds that petitioners' arguments were outside the scope of the proceeding below, because FERC had decided to focus only on market manipulation and similar behaviors. Pet. App. at 4a-5a. Petitioners had also argued that Section 206(a) itself required FERC to determine the just and reasonable rate "to be

thereafter observed and enforced" once it found existing market-rate authorizations to be unlawful, and that FERC had not done so. The D.C. Circuit found no error in FERC's order which stated that:

> [t]he 'filed rate,' in this case, *will be* the behavioral standards voluntarily incorporated into the seller's tariff as an agreed [upon] condition relating to its grant of market-based rate authority").

Pet. App.at 6a (emphasis added).

The court denied petitions for rehearing and rehearing en banc. Pet. App. at 6a and 7a.

REASONS FOR GRANTING THE WRIT

In the decision below, the D.C. Circuit rejected the seventy-plus-year regulatory scheme established by the FPA and this Court's precedents, by restricting the Commission's duty to investigate and remedy unlawful initial or existing rates, prospectively after a hearing under FPA Section 206(a), to only those rate elements that FERC suspects to be unlawful *prior* to the hearing. Nonetheless, the D.C. Circuit approved existing FERC "market-rate tariffs," along with "behavior conditions," as the "filed rate" to be charged prospectively, while simultaneously *once again* declining, for procedural reasons, to review whether such "market-rate tariffs" comply with the FPA. This Court should grant review of the D.C. Circuit's decision, which poses questions of critical importance to the proper administration of FERC's responsiblities to protect consumers from unlawful rates under the FPA, for three principal reasons.

First, the D.C. Circuit's decision limiting FERC's duty to investigate the lawfulness of initial or existing rates to only those rate elements that it anticipates to be unlawful *before* a hearing begins, and simultaneously *excluding* challenges to the lawfulness of existing market-rate tariffs that FERC de-

termines are to be charged as the "filed rate" prospectively, will seriously diminish the ability of consumers and their advocates to participate meaningfully in rate proceedings under Section 206 of the FPA, the primary purpose of which is to ensure that all wholesale electric rates are "just and reasonable." Because retail consumers actually pay these costs, which are required to be passed through under the Supremacy Clause, such ultimate consumers are principal parties that the FPA was enacted to protect.

The decision below stated that, because FERC *found* only one aspect of the rates to be unlawful (conveniently, the one it proposed to remedy at the outset of the hearing), FERC did not have to consider whether other elements of the rates were also unlawful. This circular argument begs the question that petitioners' raise on appeal, *viz.* whether FERC should have *considered* arguments raised below regarding the unlawfulness of other aspects of the "market-rate authorizations," so that FERC could have made findings regarding them as well.

Second, the D.C. Circuit's decision below fails to follow this Court's holdings in *Maislin* and *MCI* as to what constitutes a proper "filed rate" under similar rate filing statutes, when it affirmed FERC's determination that the prospective "filed rate" would consist of existing market-rate authorizations, with behavior conditions added. Such market-rate "tariffs" establish no real rate because they merely state that the rate will be "whatever the seller and buyer agree." Even narrower "ranges of rates" have been rejected as contrary to a statute requiring filed rates by this Court and by the D. C. Circuit itself, under the rate filing statutes on which the FPA was modeled. The decision below also fails to follow the D.C. Circuit's own precedent under the FPA regarding the requirement for "certain" and "predictable" rates in *Electrical District No. 1 v. FERC,* 774 F.2d 490 (D.C. Cir. 1985) and its progeny.

Third, the D.C. Circuit's decision below continues [and extends] the uncertainty regarding the legal basis for FERC's "market-rate authorizations" by once again declining to address whether those authorizations conform to the statutory rate filing and review requirements of the FPA, while yet again affirming FERC orders regarding a single aspect of such market-rate "tariffs." The D.C. Circuit's willingness to approve FERC market-rate orders, including the use of "market-rate tariffs" prospectively, without addressing, for a variety of procedural reasons, the core legality of such tariffs under the FPA, has led to a confused state of the law in various circuits, and has done nothing to decrease substantial existing uncertainty regarding the validity of FERC-allowed "market" rates and contracts. Nonetheless, these FERC-allowed prices must be passed through by states to retail consumers under the Supremacy Clause of the United States Constitution and doctrines of federal preemption. *Nantahala Power and Light Company v. Thornburg,* 476 U.S. 953 (1986).

I. THE D.C. CIRCUIT'S NOVEL LIMITATION ON THE SCOPE OF SECTION 206 PROCEEDINGS IS AN ISSUE OF GREAT IMPORTANCE DEMANDING THIS COURT'S REVIEW.

The novel decision below would substantially limit what this Court stated in 1956, in interpreting the comparable Section 5 of the Natural Gas Act ("NGA"), is "the basic power of the Commission," that is, "to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.'" *United Gas Pipe Line Co. v. Mobile Gas Serv. Cor. [Mobile],* 350 U.S. 332 (1956).

Indeed, as the Court below acknowledged, FERC *must* remedy a rate that it finds to be unlawful. Pet. App. 4a. However, the decision below would restrict FERC's authority under FPA Section 206(a)

to *considering* only those rate elements that it proposes to remedy at the outset of a hearing, regardless of any evidence or legal arguments produced by others during the hearing demonstrating that the rates under review-in this case "market-rate taiffs"-contain *other* unlawful elements.

The text cited by the court below requiring FERC to specify before a hearing its *proposals* for changing existing rates cannot reasonably be read to overturn the primary mandate of Section 206(a) that FERC must determine a lawful rate to replace *any* rate found, *after hearing*, to be unlawful. Such an interpretation would require FERC to either be completely clairvoyant so as to know, before hearing, every element of an initial or existing rate that may be unlawful (which is impossible), or to refuse to consider any new evidence or arguments raised at hearing that challenges other rate elements (which raises due process concerns). In any event, FERC cannot properly refuse to reply to challenges to its own statutory authority by merely declining to specify such challenges as a subject of a hearing.

A. The Decision Below Conflicts with Longstanding Agency and Court Interpretation of the Proper Operation of Federal Power Act Section 206(a).

This Court interpreted the NGA and FPA rate provisions in *Mobile* in 1956:

> [T]he very premise that [NGA] §§ 4(d) and (e) and 5(a) [FPA §§ 205(d) and (e) and 206(a)] are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.

Mobile at 340-341.

This Court continued:

> [NGA] § 5(a) [FPA § 206(a)] would of its own force apply to all the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e) [FPA § 205(e)].

Id.

The Courts and Commission have long interpreted and used NGA Section 5(a) and FPA Section 206(a) to address all unlawful elements of initial and "long-established" rates. For example, the *Permian Basin Area Rate Cases,* 390 U.S.747 (1968) were Section 5(a) cases initiated to set natural gas rates in the Permian Basin, yet petitioners there raised not only statutory, but also constitutional, challenges to FERC's authority to set area rates for natural gas wellhead gas. *Id.* at 752. Similarly, the proceeding in which FERC established "open access" transmission tariffs under the FPA prospectively was conducted under both sections 205 and 206, as most FPC and FERC rates cases have always been. *New York v. FERC,* 535 U.S. 1 (2002).

B. The Decision Below Regarding Section 206(a) Would Seriously Limit the Ability of Consumers and Their Advocates to Effectively Participate in FERC Rate Hearings.

The decision below, in allowing FERC to limit its rate investigations under section 206(a) to only those unlawful aspects of a rate that it can spot before a hearing is held, would seriously limit the ability of other parties, such as consumer advocates, state commissions or wholesale buyers, to participate in broad rate investigations affecting "all" wholesale rates under "market-rate tariffs." Such parties would be limited in their challenges to whatever topic and

to whatever remedies FERC had specified at the beginning of its rate investigation under Section 206(a), even though the burden of proof is on FERC to support its findings and its determination of prospective lawful rates. 16 U.S.C. 824e(a).

Petitioners have the burden of adequately and sufficiently raising their legal arguments and evidence, but the D.C. Circuit did not find that they had failed to do so here; it held only that petitioners were off-topic. Since the "topic" was, *inter alia,* the lawful rates to be enforced "thereafter," it is hard to imagine how petitioners' arguments that FERC's limited "fixes" were insufficient to satisfy statutory requirements for lawful rates could be outside the scope of a hearing designed to determine such rates prospectively. And the decision's broad language will stifle due process and statutory sufficiency in *all* future electric rate hearings conducted under Section 206(a) by allowing FERC to strictly limit the arguments that can be raised to those unlawful rate elements that FERC anticipates before the hearing begins.

Indeed, the very complaint that petitioners raised here is that FERC's "market-rate tariffs" to be charged *prospectively* do not, and will continue not to, set forth certain and predictable rates and rate changes that consumer advocates can evaluate and protest if warranted. This point was made in *Regular Common Carrier Conf. v. United States,* 793 F.2d 376 (D.C. Cir 1986), where the D.C. Circuit considered an ICC rule that allowed unpublished rates to be determined by averaging prior charges to shippers. Then-Judge Scalia there found that an actual rate contained in a filed tariff was "utterly central to the Act." Without it, he noted, it would be "monumentally difficult" to enforce the requirement that rates be reasonable and nondiscriminatory, and "virtually impossible" for the public "to assert its right to challenge the lawfulness of existing or proposed rates." 793 F.2d at 379 (citations omitted, emphasis added).

The D.C. Circuit effectively found below that petitioners not only could *not* assert their right to challenge the lawfulness of existing or proposed wholesale electric rates under "market-rate tariffs," but also that they could not even challenge whether FERC has statutory authority to *exclude* them from such participation by refusing to require public utility sellers to file their rates and future rate changes for review as the FPA requires. Section 206(a) cannot be permissibly read to sanction such an exclusion of consumers and their advocates from meaningful participation in FPA rate determinations.

C. The Court Below Erred Because Petitioners' Legal Arguments Regarding Market-Rate Tariffs Were Clearly Within The Scope Of FERC's Prospective Rate Determination

Petitioners argued before the D.C. Circuit that FERC, having found below that its existing "market-rate tariffs" without "behavior conditions" were unlawful, was required by Section 206(a) to determine the lawful rates to be "observed and enforced thereafter." At a minimum, this meant that FERC must find that its existing market-rate tariffs, with the new behavior conditions added, were "just and reasonable" rates to be charged prospectively. The D.C. Circuit held that FERC had made the only finding below that it need make—that the "filed rate" going forward would be the existing market-based rates plus behavior conditions. Pet.App.at 6a.

Petitioners' challenges that existing market-rate tariffs were *not* lawful, even with the behavior conditions added, were clearly within the scope of the Section 206(a) proceeding below in which FERC was required to determine lawful rates to be observed prospectively, and in which it in fact determined that such rates would be those existing market-rates, plus behavior conditions.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDINGS IN *MAISLIN* AND *MCI* AS TO WHAT CONSTITUTES A SUFFICIENT "FILED RATE" TO BE ENFORCED PROSPECTIVELY.

As discussed above, the D.C. Circuit affirmed FERC's finding that the prospective, enforceable "filed rates" would be existing market-rate tariffs with behavior conditions included. Because such existing market-rate tariffs merely state that rates will be "whatever seller and buyer agree," the court below erred in finding that such "tariffs" constitute the lawful, certain and predictable "filed rates" that the FPA, this Court's holdings, and the D.C. Circuit's own precedent require.

A. FERC's "Market-Rate Tariffs," Allowing "Non-Dominant" Wholesale Electricity Sellers To Charge Whatever Buyers Will Pay, Directly Conflict With This Court's Holdings In *Maislin* And *MCI*.

This Court has held that federal regulatory agencies cannot "detariff" or "flexibly reduce" statutory rate filing requirements even if the agencies' goal is to encourage competition. *MCI*, 512 U.S. at 234; *Maislin*, 497 U.S. 116, 135 (1990). This Court has likewise rejected agency attempts to detariff only certain, *non-dominant* regulatory entities. In *MCI*, the FCC had allowed non-dominant carriers not to file their rates, relying instead on market forces, a complaint process, and the agency's ability to reimpose tariff-filing requirements in the future to protect the public interest. The FCC reasoned that such "detariffing" would benefit consumers by promoting competition, while meeting the substantive requirements of the Communications Act for just and reasonable rates. This Court held in an opinion by Justice Scalia that the agency was in fact attempting a fundamental revision of the statute from complete

rate regulation "*to a scheme of rate regulation only where effective competition does not exist.*" *MCI*, 512 U.S. at 231 (emphasis added).

The sentence above exactly describes FERC's MBR tariffs, which eliminate rate regulation only where sellers are "non-dominant" in FERC's view because they lack "market power." Such "non-dominant" sellers need only "report" actual rates, if at all, months after they are being charged, pursuant to "reporting requirements" that trigger none of the statutory consumer protections for filed rates under the FPA, such as prior FERC and public review, rate suspension, refunds, and hearing with the burden of proof on the seller.

This Court has interpreted analogous provisions in the FPA, the Communications Act ("CA") and the Interstate Commerce Act ("ICA") similarly, in recognition that the ICA served as the model for the FPA and the CA. See, *e.g.*, *Northwestern Pub. Serv. Co. v. Montana-Dakota Utils. Co.*, 181 F.2d 19, 22 (D.C. Cir. 1950), *aff'd*, *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co*, 341 U.S. 246 (1951). Cases under the ICA and CA holding that the absence of a calculable rate serves to invalidate an otherwise binding tariff thus apply with equal force under the FPA.

FERC argued below that rates under its market-rate tariffs are "changed" only once: when a seller switches from a cost-based wholesale electric rate to a "market-based" rate. FERC Br. at 46. ("Under the market-based rate regime, the rate change occurs when an applicant makes a FPA Section 205 filing to shift from cost-of-service pricing to market-based pricing.") FERC argued below that Section 205(e) consumer protections could be employed at *that* time, but, by definition, no subsequent *actual* changes or increases in rates are recognized as such by FERC under its MBR regime. The market-based tariff itself, of course, contains *no actual amounts* to

be charged, so no actual increased charges need ever be filed in advance for FERC and public review under Section 205(d), nor can any such actual increased rates or charges be suspended, made subject to refund, or set for hearing with the burden of proof on the seller under Section 205(e) under FERC's statutory defense of its MBR regime.

In summary, FERC has fundamentally altered the regulatory scheme enacted by the Congress in a way that completely undermines the goal of the FPA's consumer protection provisions, *viz.*, to provide consumers "a complete, effective and permanent bond of protection from excessive rates." *Atlantic Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 388 (1959). See, also, *Electrical District No. 1,* 774 F.2d at 492-493 (provisions of FPA must be read in light of the statute's "primary purpose of protecting the utility's customers.")

B. The Decision Below Also Conflicts with D.C. Circuit Precedent Holding That Federal Agencies May Not Substitute a "Range of Rates" for the "Certain" and "Predictable" Rates Mandated By Congress.

The D.C. Circuit's decision below affirming FERC's determination that the "filed rate" to be enforced prospectively would be the existing market-rate "tariffs," with behavior conditions added, conflicts with precedent in that Circuit applying this Court's holdings regarding the sufficiency of rate filings under similar rate filing statues, as well as with the D.C. Circuit own interpretations of the rate filing requirements of the FPA itself.

The D.C. Circuit both anticipated and followed this Court's holdings in *Maislin* and *MCI,* above, in its decisions regarding rate filings under the ICA and CA. In *Regular Common Carrier Conf. v. United States,* 793 F.2d 376 (1986), the court considered an

ICC rule that allowed unpublished rates to be determined by averaging prior charges to shippers. The statutory provision that actual rates must be contained in a filed tariff was, according to then-Judge Scalia, to be "utterly central to the Act." 793 F.2d at 379. As noted above, he found that without a rate in the tariff, it would be "virtually impossible" for the public, such as petitioners, to assert its right to challenge the lawfulness of existing or proposed rates. *Id.* (citations omitted).

Following *MCI,* the D.C. Circuit in *Southwestern Bell Corp. v. FCC,* 43 F.3d 1515 (1995), rejected an attempt by the FCC to permit "non-dominant carriers" to file a range of rates. Quoting *MCI,* the court held that the FCC could not ignore congressional directives simply because it believed "traditional tariff regulation" was "unnecessary":

> For better or worse, the Act established a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire "to 'increase competition' cannot provide [the agency] authority to alter the well-established statutory filed rate requirements," .... "[S]uch considerations address themselves to Congress, not to the courts."

43 F.3d at 1519, quoting *MCI,* 512 U.S. at 234.

The Court continued, "[T]he clear and definite language of the rate-filing provision does not encompass the concept of ranges," but something "more definite and specific than rate ranges." *Id.* at 1521. Here, FERC's allowance of any rates the seller and buyer "agree" upon constitutes a range of rates far greater than that prohibited by the D.C. Circuit in *Southwestern Bell.*

Moreover, in addressing the sufficiency of "filed rates" under the FPA itself, the D.C. Circuit has held that it is not enough for FERC to merely provide

general principles governing how rates are established; FERC must either specify the actual amount to be charged—that is, "the rate itself," *Electrical Dist. No. 1. supra,* at 490 (1985), or FERC must state "a rate 'formula' or a rate 'rule'" from which rates may be predictably determined. *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC,* 955 F.2d 67 (1992), *Transwestern Pipeline Co. v. FERC,* 897 F.2d 570, 577, *cert. denied,* 498 U.S. 952 (1990), and *Associated Gas Distribs. v. FERC,* 893 F.2d 349, 354 (1989). The empty market-rate "tariffs" authorized by FERC do not satisfy this longstanding requirement.

III. THE DECISION BELOW EXTENDS THE SUBSTANTIAL LEGAL UNCERTAINTY REGARDING FERC'S ENTIRE ELECTRIC "MARKET-RATE" REGIME.

The D.C. Circuit may have been justified initially in 1993 in approving certain aspects of FERC's gas market rates, or approving a particular market-based rate authorization in 1998, without reviewing the legality of that entire market programs under the NGA and FPA, where petitioners did not adequately or timely raise their statutory objections (see discussion below). There nonetheless comes a point where that court's continuing approval of individual aspects of an agency program, without reviewing challenges to its overall legality, constitutes *sub rosa* approval without issuing an appealable decision. Petitioners believe that this point was reached below, where that court accepted a belated argument that petitioners' challenges were outside the scope of the Section 206(a) proceeding, despite the fact that FERC never raised this scope argument during the three-year administrative proceedings below (which would have allowed petitioners to challenge it then or to seek another forum in a timely manner), nor did FERC make the scope claim in its first brief to the court of appeals.

A. The D.C. Circuit Has Never Addressed the Question of Whether FERC's "Market-Rate" Regime Complies with the Rate Filing and Review Mandates of the FPA, While Continuing to Approve FERC Orders Under That Regime.

The decisions of the D.C. Circuit, on which sellers-both traditional and "independent" public utilities (the latter often owned by the former)-rely for support of FERC's MBR regime, specifically state that they do NOT address arguments regarding either FERC's failure to comply with statutory procedural requirements or the validity of FERC's entire MBR program, because such claims were either raised too late or not at all. *See*, Norlander, "May the FERC Rely on Markets to Set Electric Rates?" 24 *Energy Law Journal* 65 (2003). In *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (1993), the D.C. Circuit specifically refused to consider arguments, raised belatedly in the petitioner's reply brief, that the market-based price in a "restructuring settlement" in that case was contrary to the statutory rate filing requirements of the Natural Gas Act. 10 F.3d at 871+-. Nonetheless, that court in *Louisiana Energy and Power authority v. FERC ("LEPA")*, 141 F.3d 364 (1998) cited *Elizabethtown Gas* for the sweeping proposition that FERC could rely on "a competitive market" to set "just and reasonable rates" for electricity under the FPA, despite the differences in deregulatory history of the two statutes. 141 F.3d at 365. However, the LEPA decision specifically noted that "LEPA does not challenge FERC's general policy of permitting market-based rates in the absence of market power," *id.* at 366, n. 2, and that its own decision was "limited" to whether a FERC order finding that a seller lacked market power was arbitrary and capricious. *Id.* This, not surprisingly, has not stopped parties promoting "market-rates" from claiming that

"the courts" have approved FERC's market-rates under the FPA citing *Elizabethtown Gas* and *LEPA*.[2]

Elizabethtown Gas was issued in 1993. It is now past time that the courts addressed the broader statutory questions, particularly in regard to electric "market-rate tariffs," which may have been inexpertly raised in the past. This is particularly true in light of the D.C. Circuit's very firm reactions to agency attempts to detariff and deregulate under the ICA and CA. *cf., Regular Common Carrier and Southwestern Bell, supra.*

B. The Ninth Circuit Relied on the D.C. Circuit's Partial Approval of FERC's "Market-Rate" Orders and This Has Led to Substantial Confusion and Contradiction in the Law.

Although the D.C. Circuit has managed to avoid addressing the legality of FERC's "market-rate tariffs," the Ninth Circuit has nonetheless relied on D.C. Circuit cases for the proposition that FERC may allow a "competitive market" to set rates under the FPA. (Actually, the FPA gives FERC jurisdiction over sellers, not over "markets.") In *California, ex rel., Lockyer v. FERC,* 383 F.3d 1006 (9th Cir. 2004), tellingly the *only* court case cited by FERC below as supporting the legality of its market-rate regime after over a dozen years, the Ninth Circuit relied on the very cases in which the D.C. Circuit had noted that it was *not* deciding the question of FERC's "gen-

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[2] *See, also, Power Company of America LP v. FERC,* 245 F.3d 839, 841 (D.C. Cir. 2001)("PCA has not identified with any specificity what regulatory obligations the Commission has shirked. It is not the court's role to fill in the blanks in counsel's argument.") In Power Company, a failure to make the proper legal arguments seems once again to have determined the outcome of a decision on the legality of FERC's MBR regime, in this case regarding whether certain filings of short-term power sales under "umbrella tariffs" were "rate schedules" required to be filed under the FPA.

eral policy of permitting market-based rates in the absence of market power." *LEPA, supra*, at 366, N.2. *Lockyer*, 383 F.3dat 1013.

Instead of looking at the filing requirements of the FPA and their purpose—to permit the public to see and FERC to review rates and determine what FPA consumer protections should be attached—the Ninth Circuit held that the D.C. Circuit said FERC could rely on competition, so the advance, public rate filing mandates of the FPA were not mandated "filing requirements" but merely belated "reporting requirements" subject to FERC's discretion. 383 F.3d at 1013. *cf. Mobile* ("the filing requirements...are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension power under s 4(e).")

This judicial bootstrapping continued when the Ninth Circuit assumed, on the basis of *Lockyer,* the validity of market-based rates when it decided the *Mobile/Sierra* contract review questions in *PUD no. 1 of Snohomish Country Washington v. FERC,* 471 F.3d 1053 (2006) and *PUC of Ca. v FERC*, 474 F.3d 587 (2006). This Court is now being asked to review those issues on the same premise, without ever having decided the underlying questions regarding whether the MBR regime is lawful.

C. FERC Has Given Changing Arguments to the Courts Regarding the Statutory Basis of its MBR "Tariffs."

Initially, FERC told the D.C. Circuit in 1991 in *Elizabethtown Gas* that FERC would closely monitor the "market-based," settlement, CIG certificate rates it approved there to ensure that the market rates "remain within a zone of reasonableness." 10 3d 866,

at 870, citing FERC's order in that case at 57 FERC 61,345 (1991).

Indeed, at the beginning of the proceeding below, FERC quoted *Farmers Union Cent. Exch. Inc. v.FERC,* 747 F.2d 1486, 1509 (D.C. Cir. 1984) for its holding that the regulatory regime itself must ensure that rates remain within a zone of reasonableness. 103 FERC at 62,375 (JA 72). The court in *Farmers Union* went further, however:

> FERC's methodology [setting an extraordinary high "ceiling" rate for oil pipelines] exposes a range of permissible prices that would exceed the "zone of reasonableness" by definition, *unless competition in the oil pipeline market drives the actual prices back down into the zone.* But nothing in the regulatory scheme itself acts as a monitor to see if this occurs or to check rates if it does not. That is the fundamental flaw in the Commission's scheme. *See Texaco, Inc. v. FPC,* 474 F.2d 416, 422 (D. C. Cir. 1972), approved in rel. part and vacated on other grounds, 417 U.S. 380 (1974).

Farmers Union at 1509 (emphasis added.)

Petitioners raised the argument before FERC below that nothing in its "behavior conditions" ensured that "competition would drive rates into a zone of reasonableness. FERC, however, read *Farmers Union* to say that FERC's conditions help ensure that market rates remain within the zone of reasonableness, but:

> In a market-based rate regime, this means that public utility sellers will not be permitted to exercise market power or take anti-competitive actions that may increase market prices ...

Id., ¶ 21.

Petitioners argued that such conditions would help make rates *competitive*, but that they did *not* ensure "that competition would drive actual prices back down into the zone" of reasonableness. FERC argued to the court below that:

> Contrary to Consumer Advocates' assertions (Br. 35-36), FERC's ratemaking method of ensuring markets are competitive, by itself, *sufficiently meets the FPA's requirement that the rates in such markets are just and reasonable based on objective measures.*

FERC Br at 36.

Thus, according to FERC, the "objective measure" of whether competition drives rates into a "zone of reasonableness" is whether competition exists.

To complete this entirely circular argument, FERC then quotes *Elizabethtown Gas* at 870, for the proposition that in a competitive market, it is rational to assume that the terms of the parties' voluntary exchange are reasonable, such that the seller makes only a normal return on investment. The cited page of the decision in *Elizabethtown Gas* in fact references FERC's assurances to that court in its orders below that:

> Here, in contrast [to *Texaco*], the FERC has made it clear that it will exercise its § 5 [FPA § 206] authority (upon its own motion or upon that of a complainant) to assure that a market (*i.e.* negotiated) rate is just and reasonable. 57 FERC at 62,113.

10 F.3d at 870.

FERC has offered the courts a changing explanation as to how it is "monitoring" whether wholesale electric rates are "just and reasonable" and "not unduly preferential or discriminatory." In fact, the very best that can be said of FERC's monitoring is

that it monitors to determine whether "competition" of some sort exists. FERC does not, and has shown no way that it will or could, monitor rates to determine whether competition "in fact" drives them down into a zone of reasonableness, and whether any such "market-rates" are unduly preferential or discriminatory.

As petitioners argued below, FERC has no objective basis on which to make the determinations required by the FPA. Thus, despite FERC's past assurances to the courts that its reliance on the market would be subject to checks to ensure rates remain in the zone of reasonableness and are not unduly discriminatory or preferential, the agency has in fact imposed a regime where the only check is the market, which is antithetical to the concepts of rate regulation incorporated in the FPA and the decades of judicial precedents interpreting it. See, *e.g.*, *FPC v. Texaco,* 417 U.S. 380, 397 (1956)("the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates....")

Decisions like the one below, moveover, have allowed that FERC's market-rate regime to remain in place without any genuine consideration by the courts about whether it complies with FERC's sole source of authority in this area, the FPA. Review by this Court of the D.C. Circuit's opinion is thus essential to ensure that the FPA's protections are not allowed, by judicial abdication, to become a dead letter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: November 2007

United States Court of Appeals
For The District of Columbia Circuit

Argued March 14, 2007 Decided June 22, 2007

No. 04-1238

COLORADO OFFICE OF CONSUMER COUNSEL, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

AMERICAN GAS ASSOCIATION, ET AL.,
INTERVENORS

On Petitions for Review of Orders of the Federal Energy Regulatory Commission

Lynn N. Hargis argued the cause for petitioners. With her on the briefs was *Gerald A. Norlander*.

Robert H. Solomon, Solicitor, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *John S. Moot*, General Counsel, and *Michael E. Kaufmann*, Attorney.

Scott H. Angstreich argued the cause for intervenors. With him on the brief were *David C. Frederick*, *Brendan J. Crimmins*, *Paul W. Fox*, *John D. McGrane*, *Edward H. Comer*, *Gary D. Bachman*, *Cheryl Feik Ryan*, *Howard E. Shapiro*, *John T. Stough, Jr.*, and *Kevin M. Downey*. *Andrea M. Kearney*, *Erin M. Murphy*, and *Charles V. Garcia* entered appearances.

Before: ROGERS, TATEL and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: In a proceeding under section 206 of the Federal Power Act (FPA), the Federal Energy Regulatory Commission determined that anticompetitive and market manipulative practices were making market-based electricity transmission rates unjust and unreasonable. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 F.E.R.C. ¶ 61,220, at 61,974–75 (2001)(initiating section 206 proceeding); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 F.E.R.C. ¶ 61,349, at 62,373–74 (2003) (asserting that investigation discovered "fraudulent or otherwise anticompetitive" energy trading strategies utilized first by the Enron Corporation and later by "a broad cross-[s]ection of the industry"); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 F.E.R.C. ¶ 61,218, at 62,142 (2003) (determining that "sellers' existing tariffs and authorizations" would be unjust and unreasonable "without clearly-delineated rules of the road to govern market participant conduct"). As a remedy, the Commission approved a series of "Market Behavior Rules" that prohibited such practices and permitted the Commission and the public to monitor market-based energy transactions more closely. *Id.* at 62,142–43 (summarizing Rules). The Market Behavior Rules were not issued in the form of Commission regulations, but instead conditions imposed upon all existing and future marketbased tariffs approved by the Commission. *See* 103 F.E.R.C. at 62,373 n.5.

Colorado Office of Consumer Counsel and others (hereinafter "Consumer Advocates") petition for review. Asserting that the Market Behavior Rules simply regulate sellers' behavior, they argue that the Commission, having found rates unjust and unreasonable, violated FPA section 206 by failing also to "fix" a new rate. Consumer Advocates go on to argue that in fixing a new rate, the Commission must reject all market-based rates. According to petitioners,

certain aspects of FPA section 205, which provides the framework for the filed rate system, are fundamentally incompatible with market-based tariffs.

The Commission argues that intervening events have mooted Consumer Advocates' claim. Specifically, after the petition was filed, Congress passed the Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594 (codified in relevant part at 16 U.S.C. § 824v), which gave the Commission explicit authority to prohibit "any manipulative or deceptive device or contrivance" used in the purchase or sale of electric energy or transmission services. On our own motion, we held Consumer Advocates' petition for review in abeyance, along with five other petitions for review regarding these proceedings, while the Commission determined whether it would exercise this new authority and, in the process, revise or repeal the Market Behavior Rules. *See Cinergy Mktg. & Trading, L.P. v. FERC*, No. 04-1168, 2006 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 15, 2005). The Commission did just that: it rescinded the Market Behavior Rules, replacing them with Commission regulations, some of which were issued under its new EPAct authority. *See Investigations of Terms and Conditions of Public Utility Market- Based Rate Authorizations*, 114 F.E.R.C. ¶ 61,165, at 61,528–29 (2006). The rescission of the Market Behavior Rules, however, does not render Consumer Advocates' claim moot, for the Commission never rescinded its determination that market-based rates had become unjust and unreasonable. Were Consumer Advocates' legal theory correct, they would be entitled to relief. There is thus still an "actual, ongoing controvers[y]," *Honig v. Doe*, 484 U.S. 305, 317 (1988), that the passage of the EPAct and the Commission's rescission of the Market Behavior Rules have failed to quiet.

Proceeding to the merits, we deny Consumer Advocates' petition for review because FPA Section 206's plain language does not require the Commission, having found only one aspect of the tariffs to be

unjust or unreasonable, to revisit all elements of its market-based rate tariffs. FPA section 206(a) states:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification . . . or . . . any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reason for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

16 U.S.C. § 824e(a). While the statute requires the Commission to act upon a finding that rates (or regulations, practices, or contracts affecting those rates) are unjust or unreasonable, it nowhere mandates that having made such a finding with respect to a discrete issue, the Commission must reopen and re-evaluate all other aspects of the filed rate. To the contrary, by requiring that "[a]ny complaint or motion of the Commission to initiate a proceeding under this section *shall state the change or changes to be made* in the rate, charge, classification, rule, regulation, practice, or contract" and mandating that the Commission "*specify the issues to be adjudicated*" at any section 206 hearing, *id.* (emphases added), the FPA makes clear that section 206 proceedings are designed to identify and address such discrete issues.

This is precisely what the Commission did. Having on its own motion initiated an investigation into the specific issues of anticompetitive behavior and market manipulation, the Commission proposed conditioning all market-based rate tariffs on new Market Behavior Rules that would prohibit these practices. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 F.E.R.C. ¶ 61,349, at 62,372 (2003). By enacting the Market Behavior Rules, the Commission "fixed" the rate with respect to the only issues it had set forth in its order initiating the section 206 proceeding. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 107 F.E.R.C. ¶ 61,175, at 61,723 (2004) (responding to Consumer Advocates' argument that it failed to "fix" a particular rate by noting that "[t]he 'filed rate,' in this case, will be the behavioral standards voluntarily incorporated into the seller's tariff as an agreed [upon] condition relating to its grant of market-based rate authority"). Finding no error in the Commission's order, we deny the petition for review.

So ordered

United States Court Of Appeals
For The District of Columbia Circuit

No. 04-1238 September Term, 2006
Filed On: August 20, 2007

[1061532]
Colorado Office of Consumer Counsel, et al.,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

American Gas Association, et al.,
Intervenors

BEFORE: Rogers, Tatel, and Griffith,
Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed August 6, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

No. 04-1238 September Term, 2006
Filed On: August 20, 2007

[1061531]
Colorado Office of Consumer Counsel, et al.,
Petitioners

v.

Federal Energy Regulatory Commission,
Respondent

American Gas Association, et al.,
Intervenors

BEFORE: Ginsburg,* Chief Judge, and
Sentelle, Henderson,* Randolph,
Rogers, Tatel, Garland, Brown,
Griffith, and Kavanaugh,
Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
Michael C. McGrail
Deputy Clerk

* Chief Judge Ginsburg and Circuit Judge Henderson did not participate in this matter.

FPA § 205, 16 U.S.C. § 824d:

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service

shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

FPA § 206, 16 U.S.C. § 824e:

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such

complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those

persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has

no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to--

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate

charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.